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Nos. 95-345 and 95-346

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE UNITED STATES

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Respondents and their amici approach the issues raised by these cases as if the Double Jeopardy Clause never existed before *United States* v. *Halper*, 490 U.S. 435 (1989). They construe that decision as having overruled, without comment, a unanimous decision rendered barely five years earlier finding the Double Jeopardy Clause "not applicable" to a civil forfeiture sanction, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984), and as having entirely displaced

the traditional imposition of criminal punishment and civil *in rem* forfeiture based on the same events, which this Court unanimously sustained against a double jeopardy attack in *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931). In respondents' view, either Congress must create novel hybrid proceedings in which civil and criminal cases are tried together under a single caption or prosecutors must use criminal forfeiture (which, unlike civil forfeiture, was entirely unknown in this country before 1970, see 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed. 1982)) whenever they seek to forfeit the property of a potential criminal defendant. Such a radical revision of how our justice system has operated since 1791 would require the most compelling justifications. Respondents' proposal instead arrives unsupported by doctrine or history, and should accordingly be rejected.

1. Respondent Ursery does not address this Court's recognition that, as used in the Fifth Amendment, the term "jeopardy" refers to a specific danger: the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. See, *e.g.*, *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Nor does he expressly take issue with our submission that this Court's understanding of "jeopardy" rests on the unique role and consequences of criminal sanctions and on the Double Jeopardy Clause's historical origins in common-law pleas peculiar to the criminal process. He assumes instead that *Halper* overruled those cases and rejected that traditional understanding, because, in his view, *Halper*'s conclusion that a civil action can violate the Clause necessarily rests on the conclusion that "the civil proceeding constitutes a second—i.e., a 'double'—jeopardy." Ursery Br. 31; see also *id.* at 10; ACLU Br. 20 (noting that, after *Halper*, jeopardy "refers to [the] risk of any punitive governmental action").

That contention is incorrect, because it disregards the fact that *Halper* did not create the "multiple punishments" doctrine. As we have explained (U.S. Br. 26-31), that doctrine already had a settled meaning when the Court invoked it in *Halper*. As applied to successive punishments, the doctrine was, and remains, a rule of finality for the "jeopardy" experienced as a result of a criminal conviction. Cf. ACLU Br. 20 n.11 (conceding that a "central purpose" of the Clause is to protect "the finality of jury verdicts"). While Ursery argues that the logic of *Halper* requires recognition of a new concept of "civil" jeopardy, see Ursery Br. 32, he overlooks that multiple-punishments analysis has never entailed a showing of two "jeopardies." See U.S. Br. 27-28. Rather, that analysis stems from *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), which involved only one criminal prosecution, and had been applied before *Halper* only to support two legal rules: (1) that a court, in a single proceeding, may not impose more punishment than the legislature intended, and (2) that following service of a criminal sentence, a court may not upset legitimate expectations of finality by imposing a new sentence. Neither of those applications required a second "jeopardy"; and the same is true of *Halper*, which extended multiple-punishments analysis to cover a punitive civil sanction imposed after a criminal conviction.[1]

Respondent fares no better with his analysis of *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct.

[1] While Ursery faults our reading of *Halper* as lacking support on anything that "the Court *said*" in that case, his own interpretation is able to explain *Halper*'s repeated and explicit emphasis on the defendant's prior conviction only by dismissing it as "simply a reflection of the fact pattern in *Halper*." Ursery Br. 32. But the *Halper* Court made clear that the prior conviction had operative legal significance in that case by expressly stating that the "only proscription" established by the Court's ruling was against the imposition of a punitive civil judgment after the imposition of a "criminal penalty." *Halper*, 490 U.S. at 451; see *id.* at 448-449 (stating Court's holding). And Ursery makes no effort to respond to our doctrinal analysis, which shows how *Halper* developed from a prohibition against multiple punishments that applies only when there is a prior criminal conviction.

1937 (1994). That case does not establish that "when the government seeks and obtains a civil sanction[] the defendant may be placed in 'jeopardy' sufficient to trigger double jeopardy protections." Ursery Br. 32-33. While *Kurth Ranch* began by asking whether the "tax" in that case "may violate the constitutional prohibition against successive punishments for the same offense," 114 S. Ct. at 1941, it concluded by holding that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was *the functional equivalent of a successive criminal prosecution* that placed the Kurths in jeopardy a second time 'for the same offence,'" *id.* at 1948 (emphasis added). As we have explained (U.S. Br. 34), in light of that language—and the Court's conclusion that the tax "must be imposed during the first prosecution *or not at all*," 114 S. Ct. at 1948 (emphasis added)—*Kurth Ranch* is best understood as finding the Montana tax to be so inherently punitive that the State could not impose it at all outside the context of a criminal prosecution. See, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In any event, it is clear that in *Kurth Ranch*, as in *Halper*, the defendant had suffered a prior criminal judgment (*i.e.*, a "jeopardy") to which a constitutional expectation of finality could attach. Ursery, in contrast, incurred no such judgment in the *in rem* forfeiture action.[2]

[2] Ursery claims in passing (Br. 28-30) that 21 U.S.C. 881(a)(7) is inherently penal under this Court's analysis in *Kennedy* v. *Mendoza-Martinez*, *supra*, such that he may claim the Double Jeopardy Clause's protection against multiple prosecutions. That claim is foreclosed by *89 Firearms*, *supra*, which rejected it with respect to an identically worded forfeiture statute. Contrary to Ursery's claim (Br. 30), *89 Firearms* cannot be distinguished on the ground that the statute at issue in that case sought to remove from circulation "potentially dangerous" firearms. While firearms are indeed potentially harmful (*Staples* v. *United States*, 114 S. Ct. 1793, 1800 (1994)), "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country" (*id.* at 1799) and therefore "owning a gun is usually licit and blameless conduct" (*id.* at 1801). Thus, the "potential" for danger that Ursery concedes is sufficient to make forfeiture of firearms "plainly more remedial than punitive" (Ursery Br. 30) flows from use of those firearms in violation of the criminal laws, which is a traditional justification for forfeiting instrumentalities of crime generally.

Witte v. *United States*, 115 S. Ct. 2199 (1995), reinforces the conclusion that a prior "jeopardy," understood as the risk of conviction for a criminal offense, remains an essential predicate for invoking the Double Jeopardy Clause. *Witte* rejected a double jeopardy claim precisely because the defendant had not faced a prior criminal prosecution for the offense for which he purportedly was punished. Ursery seeks to explain *Witte* by suggesting (Br. 33-34 & n.17) that Witte's first criminal sentence was authorized by the Guidelines, even if it also reflected a punitive enhancement for a different crime for which he was later separately prosecuted. That explanation does not distinguish this case, because everything the government did here was duly authorized by statute. Nor is it responsive to our basic point about *Witte*: that the Court's reasoning and judgment cannot be squared with respondent's view that the Court has abandoned the traditional understanding of "jeopardy." Indeed, while Ursery ultimately asserts that *Witte* cannot mean what the Court's opinion says, because "such a reading * * * could not be squared with *Halper* or *Kurth Ranch*," Ursery Br. 34 n.17, the more accurate conclusion is that *Witte* shows why Ursery's reading of *Halper* and *Kurth Ranch* is incorrect.

The anomalous consequences of Ursery's notion that civil sanctions can give rise to "jeopardy" are illustrated by his claim (Br. 35-39) that his crime is a lesser-included offense of *in rem* forfeiture under 21 U.S.C. 881(a)(7). The rules governing lesser-included offenses provide that a defendant may be convicted of any lesser offense that the jury finds proven when the jury does not convict on the greater offense. See Fed. R. Crim. P. 31(c); *Schmuck* v. *United States*, 489 U.S. 705, 717-718

(1989); see also *Rutledge* v. *United States*, No. 94-8769 (Mar. 27, 1996), slip op. 12-15 (when conviction for a greater offense is reversed on grounds that do not affect a lesser-included offense, a court generally may enter judgment on the lesser-included offense). It is meaningful to say that a criminal defendant is "in jeopardy" for lesser-included offenses whenever he is put to trial on a greater offense, because ordinarily a possible legal outcome of the proceeding is the entry of a judgment of conviction for the lesser-included crime. That plainly is not true of the purported "jeopardy" that results from the institution of civil forfeiture proceedings; there is *no* possibility that the court, upon finding the purported "additional element" of the forfeiture "offense" not proven, could instead enter a judgment convicting the property claimant of a crime.

Thus, both this Court's cases and a common-sense appraisal of the limited risks that Ursery actually faced in the forfeiture proceeding demonstrate that his double jeopardy claim is untenable. That acceptance of Ursery's claim would require, as his amici essentially concede (see ACLU Br. 6 n.2), the outright repudiation of a line of authority that this Court unanimously endorsed little over a decade ago in *89 Firearms* simply adds to the heavy burden of justification that his claim faces in this Court. Compare *United States* v. *Felix*, 503 U.S. 378, 389 (1992). He has not met that burden.

2. Respondents dispute our submission that civil *in rem* forfeitures cannot be said to inflict "punishment" for purposes of the Double Jeopardy Clause. Respondents contend that our argument is inconsistent with *Halper* and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), and that it would require the Court to "overrule[]" those cases (Ursery Br. 18; see also Arlt & Wren Br. 12). That is not so. A holding that the proceedings in these cases are constitutional does not require the Court to reject its holding in *Halper* that the "multiple punishments" doctrine of double jeopardy law precludes a punitive civil

sanction after a criminal defendant's conviction, or its holding in *Austin* that the Excessive Fines Clause of the Eighth Amendment applies to *in rem* forfeitures.

Our opening brief made two points relevant to respondents' claim that civil forfeitures under 21 U.S.C. 881 are categorically punitive. U.S. Br. 38-40. First, we noted that a single passage in *Halper* (which *Austin* later reiterated) suggested that a sanction that acts in any part as a deterrent must be viewed as "punishment," but we explained that that passage is unjustifiably broad and unnecessary to the holding in either *Halper* or *Austin*. Second, we noted that *Austin* expressly recognized that it did not make any difference, in the context of an Eighth Amendment claim, whether all forfeitures under 21 U.S.C. 881(a)(4) and (a)(7) are categorically deemed to be "punishment," since only "excessive" forfeitures would be barred. Thus, two key legal propositions on which respondents base their claims that civil forfeiture under 21 U.S.C. 881 is always punishment for double jeopardy purposes are dicta. An argument that the Court should disavow those propositions cannot fairly be read as seeking the overruling of *Halper* and *Austin*; it merely "invok[es] [the Court's] customary refusal to be bound by dicta." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994); see also *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995); *Kokkonen* v. *Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994).

This Court's most recent forfeiture decision, *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), shows that respondents' reading of *Halper* and *Austin* is overbroad. *Bennis* rejected the claim that an innocent owner has a constitutional defense to the forfeiture of property that "facilitated and was used in criminal activity." *Id.* at 1001. In so doing, the Court made clear that "forfeiture * * * serves a deterrent purpose distinct from any punitive purpose," *id.* at 1000—*i.e.*, that deterrence itself is *not*

punitive and that a deterrent purpose is not sufficient to transform a forfeiture into "punishment." The Court thus declined to depart from its "longstanding practice" (*id.* at 1001) in civil forfeiture cases, a practice that is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," *ibid.* (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)).

That long common-law lineage of civil forfeitures of property used to commit or facilitate crimes is especially significant in assessing respondents' claims of former jeopardy, because "[i]n applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept * * *, a long course of adjudication in this Court carries impressive authority." *Gore* v. *United States*, 357 U.S. 386, 392 (1958); see also *Richardson* v. *United States*, 468 U.S. 317, 325-326 (1984); *Green* v. *United States*, 355 U.S. 184, 199 (1957) (Frankfurter, J., dissenting). *Austin* concluded that civil forfeitures of instrumentalities of crime always have been understood as embodying an element of punishment, which is sufficient to bring the Eighth Amendment into play. 113 S. Ct. at 2807-2809. Respondents, however, cannot show that those forfeitures *ever* have been deemed sufficiently punitive to trigger double jeopardy protections. Indeed, they do not cite a single case from this Court that has so held.

That failure is telling, because the Fifth Amendment has been on the books since 1791 and laws that authorized *both* a civil forfeiture of property used to commit crimes *and* a criminal prosecution of the property's owner were among the earliest statutes enacted by Congress.[3]

[3] *Austin* relied on the first comprehensive customs statute, enacted two months before Congress proposed the Bill of Rights to the States, to demonstrate that the Framers of the Eighth Amendment considered *in rem* forfeiture, at least in part, as a punitive measure. 113 S. Ct. at 2807-2808. The provision cited by *Austin* forbade unloading goods at night or without a permit. It provided not only for criminal punishments for any ship master who permitted such unloading (he was required to pay a fine and was barred from holding federal office or employment, and in addition his name was to be published "in the public gazette of the State in which he resides, within twenty days after * * * conviction"), but it also *mandated* forfeiture *in rem* of the offending property. See Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39. That provision was hardly an anomaly. See § 25, 1 Stat. 43 (monetary fine on persons convicted of knowingly concealing or buying illegally imported goods *in addition to* the *in rem* forfeiture of the goods); § 34, 1 Stat. 46 (up to six months' imprisonment on persons convicted of re-landing goods entitled to a drawback *in addition to* the *in rem* forfeiture of the goods, the vessels carrying them, and any boats used in loading and unloading them). Similar provisions were included in customs statutes enacted after the Bill of Rights was ratified. See Act of Aug. 4, 1790, ch. 35, §§ 27, 49, 60, 1 Stat. 163, 170, 174; Act of Mar. 2, 1799, ch. 22, §§ 50, 69, 82, 1 Stat. 665, 678, 692. Those provisions were codified in substantially similar form in Sections 2873, 2874, 3049 and 3082 of the Revised Statutes (1874).

Indeed, in one of its earliest forfeiture decisions, this Court noted (in rejecting, ironically, the claim that the government was *required* to prosecute criminally before it could obtain an *in rem* forfeiture) the accepted practice of imposing both sanctions:

> Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. [Rather,] the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.); see also *In re Lezynsky*, 15 F. Cas. 397, 400-401 (C.C.S.D.N.Y. 1879) (No. 8,279) (noting that early statutes frequently called for criminal prosecution of persons whose property was also civilly forfeitable).[4]

[4] No question concerning the validity of such "dual" enforcement schemes was even raised until *Coffey* v. *United States*, 116 U.S. 436 (1886), held that an acquittal in a criminal trial precluded relitigation of the same facts in a civil *in rem* proceeding. See *United*

The fact that civil forfeiture has never been thought sufficiently punitive to raise double jeopardy concerns when Congress provides for it in addition to the criminal prosecution of the property's owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 327-328 (1936); see also *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 728 n.2 (1988); *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 & n.3 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790-792 (1983). Indeed, this Court unanimously rejected a double jeopardy claim comparable to that of respondents in *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931), see U.S. Br. 21—a decision that respondents *sub silentio* would apparently have this Court overrule.

Amicus ACLU attempts to downplay the significance of the historical record by asserting that early *in rem* forfeiture statutes applied only to illegally imported merchandise, the equivalent of forfeiting illegal contraband.

States v. *Olsen*, 57 F. 579, 584-585 (N.D. Cal. 1893) (discussing *Coffey* and noting that "until recently no question has been raised as to the right of the government to proceed in one action for the forfeiture of the offending thing, and in another for the punishment of the offender"); see also Rufus Waples, *Treatise on Proceedings In Rem* § 21, at 23-24 (1882). *Coffey* was ambiguous on the extent to which its conclusion was based on double jeopardy law, see *89 Firearms*, 465 U.S. at 358, 361, and the lower courts continued to adhere to the view that an *in rem* forfeiture of property and the criminal prosecution of its owner were not barred by double jeopardy. See, *e.g.*, *United States* v. *Three Copper Stills*, 47 F. 495, 499 (D. Ky. 1890) ("[t]here is no case known to me which decides that [double jeopardy] includes a proceeding *in rem*"); *Olsen*, 57 F. at 584-585; but see *United States* v. *One Distillery*, 43 F. 846, 853 (S.D. Cal. 1890) (relying in part on *Coffey* to hold that government could not bring both civil forfeiture action and criminal prosecution), aff'd on other grounds, 174 U.S. 149, 152 (1899). This Court expressly overruled *Coffey* in *89 Firearms*, where it acknowledged that "for nearly a century" *Coffey*'s "analytical underpinnings * * * ha[d] been recognized as less than adequate." 465 U.S. at 361.

ACLU Br. 11, 22; see also Ursery Br. 29-30. As is clear from the Act of July 31, 1789, however, those statutes frequently required the forfeiture of the boats and vessels that *facilitated* the unlawful activity in addition to the merchandise itself. Nor were the early *in rem* forfeiture provisions limited to customs laws. From 1789 to 1819, multi-faceted enforcement schemes, employing *in personam* penalties in conjunction with *in rem* forfeiture, were used in statutes that regulated the registration of vessels;[5] required the licensing of vessels employed in coastal trade and fisheries;[6] prohibited trade with Indian tribes without a license;[7] penalized the outfitting and arming of vessels intended to be used in the service of a foreign state;[8] outlawed the importation of slaves from foreign countries;[9] and criminalized acts of pi-

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[5] See Act of Sept. 1, 1789, ch. 11, §§ 35-36, 1 Stat. 65 (providing for the forfeiture of any vessel using a fraudulent certificate of registry *and* penalizing the person who committed the fraud), reenacted in Act of Dec. 31, 1792, ch. 1, §§ 27-28, 1 Stat. 298.

[6] See Act of Feb. 18, 1793, ch. 8, §§ 30, 32, 1 Stat. 316 (providing for the forfeiture of any vessel, as well as its cargo, with a forged or altered license *and* penalizing the person who falsified the license).

[7] Act of Mar. 1, 1793, ch. 19, § 3, 1 Stat. 329 (imposing fine or imprisonment, or both, on any person attempting to trade with Indian tribes without a license *and* providing for the forfeiture of all merchandise in that person's possession).

[8] See Act of June 5, 1794 (the "Neutrality Act"), ch. 50, § 3, 1 Stat. 383 (in addition to forfeiture of the vessel and all materials and ammunition "procured for the building and equipment thereof," "every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor").

[9] See Act of Mar. 2, 1807, ch. 22, § 2, 2 Stat. 426 (any ship or vessel fitted out for the importation of slaves from foreign countries "shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts, for the district where the said ship or vessel may be found or seized"); § 3, 2 Stat. 426 (any person who so fits out a vessel, knowing it to be used for that purpose, shall "forfeit and pay twenty thousand dollars"). See also § 4, 2 Stat. 427 (any per-

racy.[10] Similar provisions were commonly found in later statutes regulating the taxation of distilled spirits[11] and banning the importation of immigrant laborers.[12]

Ursery and amicus ACLU attempt to recast *Austin* as holding that 21 U.S.C. 881 always inflicts "punishment," even if other forfeitures of property used to commit crimes generally would not be punitive. See Ursery Br. 22-23; ACLU Br. 11-17. That turns *Austin* on its head. While *Austin* did examine specific features of 21 U.S.C. 881(a)(4) and (a)(7), it did so only to ascertain whether anything in the text or history of those provi-

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son who takes a slave on board his ship with the intent to sell the slave in the United States shall forfeit and pay five thousand dollars, *and* the ship and all of its cargo shall be liable for seizure); § 7, 2 Stat. 428 (any vessel caught with a slave on board within United States waters in violation of the Act shall be forfeited, along with all of its cargo and effects, *and* the captain, master, or commander of the vessel shall be subject to prosecution for a high misdemeanor). Similar provisions were reenacted in the Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

[10] See Act of Mar. 3, 1819, ch. 77, §§ 4-5, 3 Stat. 513-514 (punishing acts of piracy on the high seas with death *and* providing for the forfeiture, in any court having admiralty jurisdiction, of any vessel involved in piratical aggression).

[11] See, *e.g.*, Act of July 13, 1866, ch. 184, § 14, 14 Stat. 151 (providing for *in rem* forfeiture of distilled spirits—as well as any materials, utensils, or vessels used in their making—that are removed or concealed with the intent to defraud the revenue *and* imposing fine on any persons concerned in such intentional removal or concealment (codified at Rev. Stat. § 3450 (1874)); Act of July 20, 1868, ch. 186, § 19, 15 Stat. 133 (imposing fine and imprisonment on any person who makes a false entry in books with intent to defraud the revenue *and* providing for *in rem* forfeiture of the distillery, distilling apparatus, the tract of land on which it stands, and all personal property on the premises used in the distilling business) (codified at Rev. Stat. § 3305 (1874)). See also Rev. Stat. §§ 3257, 3281 & 3451.

[12] See Act of July 5, 1884, ch. 220, §§ 2, 10, 23 Stat. 115, 117 (providing that vessel may be libelled if vessel master knowingly transports Chinese laborers in violation of the Act *and* providing that master shall be guilty of a misdemeanor).

sions "contradict[ed] the historical understanding of forfeiture as punishment." 113 S. Ct. at 2810. The Court concluded that the legislative background of 21 U.S.C. 881 did not dispel what the Court believed always has been true of all forfeitures of property used in the commission of crime—that they "historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. In light of the Court's assimilation of 21 U.S.C. 881(a)(4) and (a)(7) to the traditional understanding of provisions forfeiting property used to commit crimes, *Austin* cannot now be turned into a special rule for narcotics forfeiture cases.

Amicus ACLU argues that forfeitures of instrumentalities under Section 881 do not serve the traditional aims of that *in rem* remedy, because "supposedly remedial objectives are nowhere mentioned in the legislative history." Br. 12. An Act of Congress, however, is not deemed to serve only those objectives that are described in its legislative history. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990). Instead, Congress is presumed to know the law, see *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), and when it enacts statutes that invoke settled legal concepts, it ordinarily must be understood to have adopted those concepts. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2256-2257 (1994); see also *Shannon* v. *United States*, 114 S. Ct. 2419, 2425 (1994). Thus, by enacting an *in rem* remedy with a long-standing lineage and recognized rationale, Congress subscribed to the traditional aims of that remedy and "expect[ed] its enactment[] to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995). No argument advanced by the ACLU establishes otherwise.[13]

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[13] The *in rem* label, of course, is not dispositive of the constitutional analysis. See ACLU Br. 11. But whether a forfeiture statute would be recognized as remedial by the Framers turns on whether it serves the purposes of the early forfeiture statutes that

Ursery also argues (Br. 24-25), that the forfeiture of his property should be deemed "punishment" for double jeopardy purposes under a *Halper* case-by-case analysis. That argument is unsound because it relies on a "presumption" (Br. 24) in Ursery's favor. Respondent, however, is the party asserting former jeopardy, and he is required affirmatively to establish his entitlement to that defense. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 791-792 (1994); *Dowling* v. *United States*, 493 U.S. 342, 350 (1990). He has failed to show that the civil sanction in the forfeiture action bears such a lack of proportion to the harms resulting from his multi-year marijuana-manufacturing operation that it must be branded as punitive. See U.S. Br. 46.[14]

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were familiar to the Framers. As this Court's recent decision in *Bennis* shows, the correct analysis does not turn, as amicus suggests (see ACLU Br. 12, 16), on purely formal matters, such as whether forfeiture was available at common law for the particular violation of law. *Bennis* recognized that, for constitutional purposes, the remedial ends of forfeiture can be advanced even in a civil proceeding *in personam*. Nor does the correct analysis depend on whether Congress has provided for an analogous remedy as part of a criminal sentence, as it did when it enacted criminal forfeiture statutes. Congress has also provided that criminal sentences may require the defendant to pay restitution to his victims, see 18 U.S.C. 3556, yet no one would suggest that the availability of that remedy as part of a criminal sentence necessarily renders the goal of victim compensation inherently punitive.

[14] For the same reason, Ursery errs in asserting that, as a factual matter, the forfeiture action and the prosecution were based on the same offense. See Ursery Br. 40-42. We do not, of course, dispute the proposition that a single criminal offense cannot be broken down into separate "theories"; that assertion, however, begs the question of what the unit of prosecution *is*, and Ursery cannot seriously contend that growing marijuana over several years, season in and season out, constitutes a single crime of manufacturing marijuana. Because the forfeiture complaint alleged that respondent did precisely that, he cannot sustain his burden of showing that the consent judgment necessarily rests on the manufacturing offense for which he was criminally prosecuted. Compare *Schiro* v. *Farley*, 114 S. Ct. at 792.

3. Respondents Arlt and Wren argue that the forfeiture of their narcotics proceeds under 21 U.S.C. 881(a)(6) constituted "punishment." As we explained in our opening brief, however, separating a criminal from the proceeds of his crimes cannot fairly be characterized as "punishment."[15] Arlt and Wren dispute that conclusion (Br. 16-31), claiming that the forfeiture of such proceeds amounts to the "taking of lawful property" (Br. 19) for a punitive purpose by the government. In support of that claim, they note that proceeds of narcotics trafficking represent not only the profits of that activity but also "some investment" of legitimate "capital and of labor in the economic endeavor." Br. 30.

The proceeds of drug trafficking, however, are not "lawful" property. That conclusion becomes apparent when respondents' activities are broken down into their component parts. Arlt and Wren invested capital and labor in the purchase and production of contraband; they then sold that contraband to obtain the properties that are the subject of this forfeiture action. They concede (Br. 27) that, notwithstanding their investment of time and legitimate capital, the contraband could have been forfeited without imposing punishment on them. See *Austin*, 113 S. Ct. at 2811; *89 Firearms*, 465 U.S. at 364. It follows that they have no greater right to possess the proceeds of the sale of that contraband; indeed, the fact that the government seeks to forfeit proceeds instead of contraband is a fortuitous result of the point at which the authorities interrupted respondents' criminal venture. Simply put, capital invested in illegal activity loses its

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[15] Respondents assert (Arlt & Wren Br. 23-24) that the assets forfeited from them constituted more than the proceeds of illegal activity. The district court's findings of fact and conclusions of law, however, demonstrate that the court found that all of the defendant properties constituted the proceeds of respondents' illegal methamphetamine trade. See 95-346 Pet. App. 55a-66a. Only after reaching that conclusion did the court consider whether the defendant properties also were subject to forfeiture under 18 U.S.C. 981(a)(1) as property "involved in" money laundering violations.

legitimate character: the labor involved in an illegal enterprise is not "honest labor" that is entitled to societal recognition, and the owner of property from the sale of drugs "has no reasonable expectation that the law will protect, condone, or even allow his continued possession of such proceeds." *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994). See also *United States* v. *Clementi*, 70 F.3d 997, 1000 (8th Cir. 1995).

Arlt and Wren maintain (Br. 26-28) that the forfeiture of proceeds constitutes punishment because the owner of property derived from a drug transaction may validly transfer the property to a bona fide purchaser or an innocent donee. See *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 127 (1993) (plurality). The statutory innocent owner defense, however, depends on a showing of the transferee's lack of knowledge of the illegal source of the funds; it does not presuppose a free-standing lawful right to possess such proceeds in the transferor.[16] See 21 U.S.C. 881(a)(6). Recognition of that defense accommodates and protects routine and good faith commercial activity. It does not change the fact that the illegal proceeds themselves are simply a substitute for the contraband that produced them.

Finally, there is also no substance to respondents' contention (Arlt & Wren Br. 25-26) that the forfeiture of drug proceeds is punitive because such forfeitures are not intended to provide restitution to a victim but instead to repay the government for "all of society's costs of drug abuse." The forfeiture of drug proceeds is remedial because it deprives a wrongdoer of property that he did not lawfully obtain. Thus, it is similar to disgorgement, which is a remedial measure that does not invariably result in restitution to the wrongdoer's victims. See *Texas American Oil Corp.* v. *Department of Energy*, 44 F.3d 1557, 1569-1570 (Fed. Cir. 1995) (en banc) (disgorgement is a remedial measure distinct from restitution); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement is remedial whether victims of wrongdoing are private citizens or government); *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain"). See also *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987) (contrasting a requirement that a defendant "disgorge profits," which is equitable in nature, with a statutory requirement intended to inflict "punishment"). The bank robber who is arrested as he exits the bank does not acquire immunity from prosecution when the stolen money is seized from him, irrespective of whether the money is ultimately returned to the bank. Indeed, if the government were to keep the money, its actions might be wrongful as to the bank, but they would not confer any constitutional rights on the robber.[17]

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[16] Respondents' hypothetical (Br. 28) in which a person uses a $10,000 bank loan to buy cocaine misses the mark for the same reason. Although the $10,000 constitutes "money[] * * * intended to be furnished * * * in exchange for a controlled substance" and thus would be subject to forfeiture under Section 881(a)(6), the bank would be entitled to assert a statutory innocent owner defense against a forfeiture action brought against the money. Moreover, because this case involves "proceeds traceable" to a drug transaction, and not money intended to be furnished for such an exchange, respondents' hypothetical has little bearing on the facts of this case.

[17] Proceeds forfeitures also serve the remedial purposes of compensating the government for the costs of investigating and prosecuting the underlying offenses and of defraying the societal cost of drug abuse. See, *e.g.*, *United States* v. *$184,505.01*, 72 F.3d 1160, 1168-1169 (3d Cir. 1995); *Tilley*, 18 F.3d at 299-300. But because the forfeiture of illegally obtained property will always be directly proportional to the remedial purpose of disgorging illegal gains and preventing unjust enrichment, recourse to its other remedial purposes is not necessary to find that the forfeitures at issue in *$405,089.23* are not punitive. Contrary to respondents' contention (Arlt & Wren Br. 25), therefore, the government need not support the forfeiture of illegal proceeds by establishing its costs of its investigation and prosecution of the underlying offenses.

4. Respondents defend the Sixth and Ninth Circuits' conclusion that forfeiture is a greater "offense" of the crimes that give rise to the forfeiture. See Arlt & Wren Br. 44-48; Ursery Br. 35-39. As we have explained, that characterization is anomalous, because the two "offenses" lack the characteristics ordinarily associated with greater and lesser offenses. That anomaly is not lessened by respondents' attempt to analogize the forfeiture "offense" to felony-murder. The Court's conclusion that felony-murder is the "same offense" under *Blockburger* v. *United States*, 284 U.S. 299 (1932), as the underlying felony flows from its characterization of felony-murder as nothing more than an aggravated form of that felony. See *Whalen* v. *United States*, 445 U.S. 684, 694 (1980) (double jeopardy analysis of felony-murder is the same as if the legislature "had separately proscribed the six different species of felony murder under six statutory provisions"). The fact that a State has a single felony-murder statute that incorporates all qualifying felonies, rather than a separate aggravation clause in each statute that defines a qualifying felony, has been deemed insufficient to change that analysis. That analysis cannot be extended, however, to characterize a civil sanction as an aggravated form of a serious criminal offense.

5. Respondents argue that the parallel civil and criminal actions at issue in these cases cannot be the "same proceeding" for purposes of the multiple-punishments doctrine. They argue that the record in *Kurth Ranch* reflected several parallel cases against the taxpayers and yet that did not preclude the Court's conclusion that one of those proceedings violated the Double Jeopardy Clause. See Ursery Br. 45; Arlt & Wren Br. 39-40. That point, however, was not briefed or argued in *Kurth Ranch*, and therefore that case "is a singularly unlikely source for a holding" (*Rutledge* v. *United States*, *supra*, slip op. 11 n.13) that parallel civil and criminal actions can never be the same proceeding for double jeopardy purposes. See *United States* v. *Shabani*, 115 S. Ct. 382, 386

(1994) ("[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred"); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

As a matter of doctrine, respondents' reliance on the formal existence of two proceedings is not sufficient to establish the existence of separate actions for double jeopardy purposes. See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980) (upholding government sentencing appeals). Rather, as *DiFrancesco* indicates, a double jeopardy claimant must demonstrate an invasion of a legitimate expectation of finality in his sentence. A proceeding is not impermissibly successive for purposes of the multiple-punishments doctrine unless it defeats that expectation. Respondents have no reasonable argument that the second proceeding defeated any legitimate expectation of finality; nor can they sustain a claim that the abuse against which the Double Jeopardy Clause guards (*i.e.*, the institution of a second proceeding "because [the government] is dissatisfied with the sanction obtained in the first proceeding," *Halper*, 490 U.S. at 451 n.10) is present. Instead, they offer an array of policy arguments and "rigid, mechanical" tests (*Serfass* v. *United States*, 420 U.S. 377, 390 (1975)) that they believe will better serve the "purposes" of the Double Jeopardy Clause. See Arlt & Wren Br. 34-36; Ursery Br. 44-47. Those purposes, however, "are more likely to be honored by following longstanding practice than by following intuition." *United States* v. *Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993). In challenging the institution of parallel civil and criminal proceedings, respondents have failed to offer a credible basis for departing from the practice that our Nation has followed for the last 200 years.

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For the foregoing reasons and those stated in our opening brief, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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